the point, and that the defendant, if he wishes the stamp of approval, must withdraw to clearer ground. Cases where the defendant has an equity to hew to the line are not so easy to deal with. In some cases the best expedient will be what we might call an experimental decree. In *Collins* v. *Wayne Iron Works, supra,* the court modified the decree so that it enjoined operations between certain hours of the night, or at any other time save behind closed doors and windows, saying "At least such a measure of relief should be tried first." In *Babcock* v. *New Jersey Stockyard Co.,* 20 N. J. Eq. 296, there is a very interesting decree with three branches, one of which was a prohibition of the keeping of live hogs on the premises for more than three hours, reserving to the plaintiff the right to apply for a modification of the time, "which is adopted merely on conjecture." In other cases, although a nuisance is proved, it may be best to postpone relief till further information is gained in regard to means of improvement. This was done in another branch of the decree last mentioned, the point being referred to a commissioner, with leave to either party to move for action upon his report. In other cases it may be best to postpone relief while the defendant experiments with remedial measures. This was done in *Shelfer* v. *London Electric Co.,* [1895] 2 Ch. 388, and in *Anderson* v. *American Smelting Co., supra.* Of course, if the balance of convenience runs the other way, it might be more equitable to render immediately a decree which would be certain to give relief, with leave to the defendant to apply for a modification upon a showing that there is another adequate and less onerous remedy. This was done in *Chamberlain* v. *Douglas, supra,* and in *Galbraith* v. *Oliver,* 3 Pittsburgh 78. These and probably other expedients are available. Equity boasts of the flexibility of its remedies. And if this phase of injunctive relief is given proper attention it would seem that we might wholly eliminate those decrees which give the defendant "no rule of conduct which the law had not before prescribed" (*Ballantine* v. *Webb, supra*), yet rumble the thunder of attachment. E. N. D.

DECLARATORY JUDGMENTS.—That statutes designed to further the cause of social justice should have to stand the test of constitutionality is inevitable under our system. It is, however, unfortunate that judges generally speaking are strongly disposed to "view with alarm" any such statutes that depart in any marked degree from the beaten path. Unquestionably there is something about legal training and experience in law, particularly upon the bench, that tends to extreme conservatism. That our judges should be reasonably conservative in order that our fundamental liberties may be preserved and the law kept steady, though progressive, through passing waves of popular desire and prejudice no sensible man can deny. But there is a big difference between such healthy conservatism and distrust of new things simply because they are new. "I have known judges," said Chief Justice Erle, "bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience." SENIOR, CONVERSATIONS WITH DISTINGUISHED PERSONS [Ed. of 1880] 314. Such a decision was that of the New York court

in *Ives* v. *So. Buffalo Ry. Co.*, 200 N. Y. 271. It took, however, such a case to arouse the people and the bar and the judges, and since that decision legislation similar to that then declared unconstitutional has been almost uniformly upheld. Thus the law does ultimately grow.

The Declaratory Judgments Act of Michigan (Act No. 150, P. A. 1919) provided as follows: (Sec. 1) "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested." (Sec. 3) "When further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order." In the case of *Anway* v. *Grand Rapids Railway Co.*, decided Sept. 30, 1920, the Supreme Court of Michigan (Sharp and Clark, JJ., dissenting) held this act unconstitutional on the ground that it called upon the courts to exercise powers and perform duties not judicial.

The act under consideration was virtually a combination of Order No. 25, Rule 5, of the English Court Rules adopted in 1883, and Order No. 54a, Rule 1, of such rules adopted in 1893, under which the English courts have entered many declaratory judgments. Mr. Justice Fellows, speaking for the majority of the court in the instant case curiously brushes aside all consideration of the English cases and practice as having no bearing because "* * * as England has no written Constitution and the English courts but follow the mandates of Parliament the decisions of the English Courts are of no avail upon the question now under consideration." The fact is that the English practice is based not upon a mandate of Parliament but upon court rule. See Joyce, J., in *Northwestern Marine Eng. Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324, 328. In other words the English courts themselves concluded to undertake this "service to the people," as they have frequently expressed it. We are then driven to the conclusion either that the English courts do not know what is properly included under judicial power or they boldly cut loose from the beaten path of judicial action. It is of course incredible that English judges do not appreciate the nature and scope of judicial power, in truth the notion of judicial power and its field were familiar to English lawyers and courts long before this country had an independent political existence. When the framers of the Constitution made provision for "the judicial power" they did not coin a new term or express a novel idea. See 1 BLACK, COMM. p. 269. The court points out that there are similar statutes in Wisconsin (Chap. 242, Laws of 1919) and in Florida (No. 75, Laws of Florida, 1919). No reference is made to the recent New York act (see

WICKERSHAM, 29 YALE L. JOUR. 908), and the New Jersey Act of 1915 (New Jersey Laws, 1915, p. 184), applied in a striking manner in *Mayor* v. *East Jersey Water Co.*, 109 Atl. 121 (1919), is referred to only in connection with construction of wills, a matter regarding which that statute does not deal, and is dismissed with the observation that "this court has for many years construed wills in equity cases * * * without question." Without giving it as a reason for its decision the court throughout its opinion lays great emphasis upon the danger and impropriety of making the courts the "authorized legal advisers of the people." Mr. Justice Fellows says: "Before this court, with its membership of eight, takes up the work of advising three million people and before the legislature is called upon to increase the membership of this court so as to efficiently conduct this work, it is well that this court pause long enough to consider and consider fully, whether the act calls upon us to perform any duties prescribed by the Constitution or to exercise any power therein conferred." It is not uninteresting to observe that the English courts have not been overwhelmed with the task of advising in the way of declaratory judgments upwards of forty million people, and the Michigan Act had the same scope as the English Rules. On the contrary, in *Dyson* v. *Attorney General* [1910] 1 K. B. 410, where the defendant vigorously asserted the impropriety of making declarations of rights in cases of the type there under consideration on the score that there would be "innumerable other actions for declarations" the court refused to recognize such objections as valid, Farwell, L. J., saying, "* * * but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favor of providing a speedy and easy access to the Courts for any of His Majesty's subjects," etc.

The court refers to and quotes from many cases to show that it is established by overwhelming authority that courts are not exercising judicial functions in rendering advisory opinions to the executive or legislative branch, and also that for the same reason cases involving merely "moot" or hypothetical questions will be dismissed. The soundness of these positions may very well be conceded. The inquiry remains, does the Act under examination provide for proceedings leading to a judgment which is merely advisory? and does it call upon the court to express opinions upon purely hypothetical situations?

Bottom is struck only when one comes to the inquiry as to what is judicial power. There are many cases which have discussed the subject and many definitions have been essayed by courts and writers. Some of these definitions standing alone clearly would exclude cases looking to mere declarations of rights, sometimes other definitions found even in the same opinion would as clearly include such proceedings. *Muskrat* v. *United States*, 219 U. S. 346, upon which the court in the principal case relied very strongly, is a splendid example of this. Out of the mass of cases can there be found some dividing line, some test by which a new situation may be determined? It does not help any to say that if the conclusion is final judicial power has been exercised, for that begs the whole question.

Surely it must be clear that the essence of judicial power is the power to make *decisions*. But that does not take us far enough. What kinds of

decisions? or decisions in what situations? Since law operates only in respect of *actual facts,* it would seem fair to say that judicial decisions must be in respect to controversies in *actual* as distinguished from hypothetical situations. Obviously these controversies must be with reference to rights, duties, or status in the legal sense, in other words, they must be justiciable. The advisory opinion cases, then, clearly fall on the side of non-judicial functions for they do not decide anything as to anybody's rights or duties in respect of actual facts. They are not *decisions* but *opinions.* "Courts do not speak through their opinions but through their judgments and decrees." *Heck* v. *Bailey,* 204 Mich. 54. The *Muskrat* case would seem clearly to fall into this class, for the case is essentially the same whether Congress asks the court to advise it as to whether an act is constitutional or not or Congress purports to authorize Mr. Muskrat to ask the court to rule on such question. The "moot" cases are equally clear. They are "moot" because there cannot be a *decision* in a controversy based on actual facts. Hence no judicial power can be exercised. The English Courts recognize this, and in *Glasgow Navigation Co.* v. *Iron Ore Co.* [1910] A. C. 243, the construction of a charter party was refused because as said by Lord Chancellor Loreburn, "It was not the function of a Court of Law to advise parties as to what would be their rights under a hypothetical state of facts." The case of *Lloyd* v. *Wayne Circuit Judge,* 56 Mich. 236, which Mr. Justice Fellows says cannot be distinguished from the one before the court, falls within this class, for the proceeding there provided for by the statute was the establishment of wills of *living* persons. It is of the essence of a will that it speaks from death, during the testator's lifetime it is nothing more than a paper with characters thereon as a deed or negotiable instrument before delivery. A request of a court to construe a contract *if it should be made* or to declare what *would be* the parties' rights thereunder would present a situation such as was passed on in the *Lloyd* case.

It is interesting and important to refer now to varying types of cases in which courts have proceeded to exercise their functions. The most common cases of course are those in which someone's rights have been invaded (whatever it is that amounts to that) and a wrong (in the sense in which the word is used in courts) has been committed. To this must be added the not unusual though less frequent cases wherein there has been a threatened invasion of someone's rights. The court in the principal case apparently would say that only in these types of cases is judicial power exercised.

It remains to be shown that courts do in a variety of situations proceed to judgment or decree where there has been no invasion or threatened invasion of rights, where they have proceeded and do proceed to final order without anything more in essence being accomplished than a declaration of the rights of the parties.

(a) There are multitudes of cases in which courts have entertained suits to quiet title or to remove clouds. Defects in chains of title give rise to such actions very frequently, and decrees are entered despite the fact that no one is really disputing the ownership of the complainant. They are thus in essence in a great many cases nothing but declarations of rights—ownership. It is not necessary to start a court in the exercise of its judicial power that

there be a controversy in the popular sense. Very many cases that proceed to final judgment with conceded propriety are amicable. The ordinary partition case is more often consented to than contested.

(b) Courts are every day entertaining bills for construction of wills, of trust instruments, and for direction of trustees. What are these but declarations? That the proceedings mentioned above are in equity is not any explanation, for courts of equity but exercise a part of the judicial power. The statement by Mr. Justice Fellows passing off the admitted exercise by chancery courts of the exercise of jurisdiction to construe wills that "such jurisdiction has been exercised without question" hardly appeals to one's intelligence as a differentiation.

(c) Closely allied to the suits to quiet title are the proceedings under the Torrens Acts to register title. There hardly can be found clearer instances of mere declarations of rights than in a large percentage of such cases. See *Robinson* v. *Kerrigan,* 151 Cal. 40. Destroyed Record Acts such as was upheld in *Title and Document Restoration Co.* v. *Kerrigan,* 150 Cal. 289, are instances of a rather special application of the principle of the Torrens Acts.

(d) The not uncommon statutes which provide for the determination of heirs without an order of distribution are another instance of a provision looking forward to a mere declaration of rights. While there is some difference in the language of the statutes as to whether such declarations are final (See 18 C. J. 876), no question has ever been raised as to the constitutionality of the statutes providing for such proceedings or as to the proceedings involving an exercise of judicial power. There is a Michigan statute (COMP. L., §§ 13937-41) of this sort under which Michigan courts for years have proceeded.

(e) That a state may constitutionally provide by statute for court proceedings to determine the validity of bonds proposed to be issued by irrigation districts was decided in *Crall* v. *Poso Irrigation District,* 87 Cal. 140, and in *Nampa, etc., Irrigation District* v. *Brose,* 11 Idaho 474. See further KINNEY ON IRRIGATION AND WATER RIGHTS, § 1420. In *Tregea* v. *Modesto Irr. Dist.,* 164 U. S. 179, there is a *dictum* expressing doubt as to whether such proceedings involve an exercise of judicial power, but nothing was decided on that point, and in *People* v. *Linda Vista Irr. Dist.,* 128 Cal. 477, the court adhered to its earlier holding in the face of such *dictum.* The principal case is the first one to rely in the least upon that *dictum.*

(f) The Wisconsin statute (§ 2352) providing for an action to affirm a marriage and that "the judgment in such action shall declare such marriage valid or annul the same, and be conclusive upon all the persons concerned" is another example of a provision for a declaratory judgment. See *Kitzman* v. *Kitzman,* 167 Wis. 308.

(g) There are plenty of cases in the books where a stockholder has sued his corporation to enjoin its payment of a tax the claim being that the tax was invalid. See *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Corbus* v. *Gold Mining Co.,* 187 U. S. 459; *Brushaber* v. *Union Pac. R. R. Co.,* 240 U. S. 10. In such cases it is common for the party vitally interested, the Government,

to appear only informally as *amicus curiae* for the purpose of insuring a correct determination of its rights. This type of proceeding is probably explained by Sec. 3224, REV. STATS. forbidding a direct action to restrain the collection of a tax.

In these cases the interests of the stockholder and the corporation are identical, there is no controversy, and the suit is merely a convenient form to secure a judicial ruling that the Government may or may not collect the tax. Under a more enlightened procedure the desired end would be accomplished by an action asking for a declaration of the rights and duties of the corporation as to such tax. So long as the suit is clothed in a familiar garb there is no objection, but if the legislature were to provide machinery whereby a corporation in such position might ask an authoritative ruling in a direct uncamouflaged proceeding, there would probably be a raising of judicial hands in horror at such Bolshevistic attempt (See opinion of Mr. Justice Fellows) to make the courts the "official advisers of the people."

(h) But the prettiest example of a case in which the final judgment is purely declaratory is to be found in the appeals by the state in criminal cases. See the discussion of this type of case *supra* 79. The objection to such proceedings is, in short, that they come after all is over. In the type of case under consideration, the principal case, the objection is that the court is asked to rule too soon.

Other instances might be cited, but the ones above may fairly be said to show the way. R. W. A.